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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 345

UNITED STATES OF AMERICA, APPELLANT

*v.*

DONALD FREED AND SHIRLEY JEAN SUTHERLAND

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

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## BRIEF FOR THE UNITED STATES

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### ORDER BELOW

The district court rendered no opinion; its order granting appellee's motion to dismiss the indictment (App. 43–44) is not reported.

### JURISDICTION

The order of the district court was entered on March 10, 1970 (App. 43). The notice of appeal was filed on April 7, 1970 (App. 45), and this Court noted probable jurisdiction on October 19, 1970 (App. 47). Under 18 U.S.C. 3731, this Court has jurisdiction of a direct appeal from a dismissal of an indictment based upon the invalidity or construction of the statute upon

which the indictment is founded.[1] *United States* v. *Spector*, 343 U.S. 169; *United States* v. *Petrillo*, 332 U.S. 1; *United States* v. *Nardello*, 393 U.S. 286.

## QUESTIONS PRESENTED

1. Whether 26 U.S.C. (Supp. V) 5861(d), which proscribes the possession by an individual of a "firearm" not registered to him, impermissibly compels an accused to incriminate himself.

2. Whether 26 U.S.C. (Supp. V) 5861(d) requires allegation and proof that a transferee of an unregistered "firearm" knew and intended at the time of transfer that the "firearm" which he possessed be not registered to him, and, if not, whether the provision is constitutional.

## STATUTES INVOLVED

26 U.S.C. (Supp. V) 5812 provides:

> (a) Application.
>
> A firearm[2] shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp

[1] In this case, the contested construction is that the statute, unless it is to be unconstitutional, requires as an element of the offense specific knowledge and intent that a possessed firearm be unregistered.

[2] 26 U.S.C. (Supp. V) 5845 defines "firearm" to include, in general, short-barreled guns other than pistols, machine guns, silencers, and destructive devices such as bombs, rockets and grenades.

affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession.

The transferee of the firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

26 U.S.C. (Supp. V) 5841(b) provides:

By whom registered.

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

26 U.S.C. (Supp. V) 5841(c) provides:

How registered.

Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm

> in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

26 U.S.C. (Supp. V) 5861(d) provides:

> It shall be unlawful for any person * * * (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record * * *

* * * * *

**STATEMENT**

A two-count indictment filed on October 15, 1969 in the United States District Court for the Central District of California charged appellees with conspiring to possess unregistered hand grenades (count 1) and the completed substantive act of possession (count 2),[3] both in violation of 26 U.S.C. (Supp. V) 5861(d). Following a pre-trial hearing conducted on February 16, 1970, the district court dismissed the charges. The court ruled that the indictment violated due process by failing

> to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally

[3] On count 2, appellee Freed was charged with actual possession, and Sutherland with aiding and abetting.

> conspired to possess [and that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of] destructive devices with knowledge that such devices were or would be unregistered.

The court also held that the federal statute which required registration, 26 U.S.C. (Supp. V) 5841 and 26 U.S.C. (Supp. V) 5861(d), is unconstitutional because, in the court's view, compliance by appellees with the statute and its supporting regulations

> would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury. [App. 44.]

## SUMMARY OF ARGUMENT

### I

The regulatory scheme which this Court found imperiled Fifth Amendment rights in *Haynes* v. *United States,* 390 U.S. 85, has since been revised and, as revised, presents no such problem. Just as in *Minor* v. *United States,* 396 U.S. 87, the class of individuals subject to the Act now includes a broad class of persons, not just those particularly suspect of crime. The class of persons who are permitted to register or accept transfers from registrants is limited to those whose control of the weapons appears to be lawful.

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The only weapons which may be transferred are those which are already lawfully registered, and a weapon once unlawfully held may not be so registered. Finally, the revised statute repeals a previous provision of law, 26 U.S.C. 6107, which directed law enforcement officials to share registration information with other law officers; rather, the statute now explicitly states that no information or evidence provided the government in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant in a criminal proceeding regarding prior or concurrent offenses.

These changes fully insulate the statutory provisions from the self-incrimination claims which this Court upheld in *Haynes*. Like the seller of narcotics in *Minor*, the transferee of a firearm is not confronted with a dilemma in which he apparently can comply with one part of the statute, but only at the risk of incriminating himself under another. The realities of the situation are such as to make it wholly improbable that a transferee seeking a weapon for unlawful purposes would ever turn to the holder of a lawfully registered weapon, seeking to use the statutory procedures for transfer. Since all other transfers are flatly unlawful, with not even an illusory promise in the statute that they can be rehabilitated, a claim that the requirement of providing information on the registration forms is incriminatory is at best marginal. In any event, the Act requires no self-incrimination on the transferee's part, since all information must come from the transferor; and if information were thought

required, 26 U.S.C. (Supp. V) 5848 directly confers immunity from its use in any criminal prosecution for completed or contemporaneous offenses. Information in the Director's files is no longer available for sharing with other law enforcement officers, and the administration of the Act shows this insulation to be effective. In sum, there is no real danger of self-incrimination under the statute.

II

The district court erred in construing Section 5861 (d) as requiring as an element of the government's proof a showing that a transferee obtained possession of a firearm with specific knowledge and intent that the firearm be unregistered. The statute contains no language suggesting the need for such proof, and the history of its predecessors, both in Congress and in the courts, conclusively shows that such a construction has never been thought to be part of the statute, or necessary to save the statute from constitutional doubt. All that the government needs to show is that the individual charged possessed the firearm which was unregistered, with knowledge that it was a firearm, and with intent to possess it.

Given the extremely dangerous character of firearms subject to the Act, it is inaccurate to characterize such a construction as imposing a penalty "for conduct alone without regard to the intent of the doer." *Lambert* v. *California,* 355 U.S. 225, 228. The very nature of the weapons is sufficient to apprise an individual possessing them that they are likely to be regulated, and thus is also sufficient to make a failure

to inquire as to the lawfulness of the possession culpable behavior in the ordinary sense. Hand grenades are certainly no less dangerous then narcotic drugs, as to which similar penalties have always been found proper. *United States* v. *Balint,* 258 U.S. 250, 254. But even if it were thought that this law does impose "absolute" or "strict" criminal liability, the *Lambert* case indicates that legislators have wide latitude so to define an offense. This is not a case like that one, where the "wholly passive", and on its face innocuous, act of presence in a city was held insufficient to apprise the individual of any duty to register his presence with the police. The government must show that appellees were in the possession of hand grenades, knowingly and intentionally; but it need not show any knowledge or intent on their part that these grenades be unregistered.

## ARGUMENT

### I

### THE REGISTRATION REQUIREMENTS PRESENT NO SELF-INCRIMINATION DILEMMA

The district court held that 26 U.S.C. (Supp. V) 5861(d) and 5841(c) are unconstitutional upon Fifth Amendment grounds identical to those urged with respect to its predecessor statutes by the petitioner in *Haynes* v. *United States,* 390 U.S. 85. Yet in *Haynes,* as in the related cases of *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, this Court rejected the proposition that such registration is unconstitutional on its face. Rather, the

Court determined that the challenged statutes were part of a valid taxing plan, but that the Fifth Amendment privilege, timely asserted, provided a complete defense to one charged with failing to comply with certain potentially incriminating registration provisions within the pertinent statutory schemes. *Marchetti, supra,* 390 U.S. at 61; *Haynes, supra,* 390 U.S. at 99. The statutory scheme in question here is the successor to the one involved in *Haynes,* and contains in large part—but with notable exceptions designed to achieve conformity with *Haynes*—the same general format as its predecessor. The issue presented in this case is, as in *Haynes,* whether the timely assertion of the Fifth Amendment privilege provides a complete defense to appellees. Neither at the hearing nor in its subsequent order did the court below give any indication why it could not resolve the constitutional question consistently with *Marchetti-Grosso-Haynes.* Accordingly, the district court was clearly in error in holding 26 U.S.C. (Supp. V) 5861(d) and 5841(c) unconstitutional.

A. THE REVISED STATUTORY SCHEME MADE SIGNIFICANT CHANGES IN THE SCHEME BEFORE THE COURT IN HAYNES

Following the decision in *Haynes,* Congress revised the National Firearms Act with the express purpose of overcoming the defects in the existing laws unveiled in *Haynes.* See S. Rep. No. 1501, 90th Cong., 2d Sess., 26, 42, 48, 52. Section 5841 requires registration with a central federal registry of all firearms covered under the Act, excluding only those in the possession or under the control of the United States. Save for an amnesty period which ended ten months before

the transfer alleged here, however, the initial registration of a firearm can be effected only by the manufacturer, importer, or maker of the weapon. Whenever a registered firearm is transferred, it must be registered to the transferee by the transferor. Firearms registered under the prior Act on the effective date of the new Act were automatically registered under the new Act; firearms not so registered and no longer in the possession of their manufacturer, importer, or maker on that date could be registered during the one-month statutory amnesty period, but not thereafter.[4] In addition, the revisions, eventually passed as Title II of the Gun Control Act of 1968, significantly expanded the coverage of the National Firearms Act, in particular so as to include "destructive devices" as covered "firearms." Section 5845(f) broadly defines this term to include explosive, incendiary, or poison gas bombs, rockets, missiles, mines,

[4] 82 Stat. 1235–1236. While this period could have been extended, the Secretary of the Treasury did not do so.

The Alcohol, Tobacco and Firearms Division, Internal Revenue Service informs us that prior to the enactment of the Gun Control Act of 1968, approximately 108,000 firearms were registered on the National Firearms Registration and Transfer Record. During the amnesty period, from November 2, 1968 to December 1, 1968, approximately 60,000 firearms were registered. Since December 2, 1968, approximately 14,800 firearms have been registered and entered in the National Firearms Registration and Transfer Record, as a result of lawful manufacture, importation or making. The National Firearms Registration and Transfer Record now contains a record, therefore, of approximately 182,000 firearms coming within the purview of the National Firearms Act.

and grenades,[5] the last being the type of weapon involved in this case.

A lawful transfer of a statutory firearm may be accomplished only if the weapon is already registered. Prior to the actual transfer of the weapon, the transferor must pay the transfer tax and receive an adhesive stamp denoting payment, 26 U.S.C. (Supp. V) 5811, which he affixes to the original of an application he submits in duplicate to the Director, Alcohol Tobacco and Firearms Division, Internal Revenue Service.[6] The transferor must identify himself by occupational tax number, if any, and by name and address. He must additionally describe the weapon to be transferred and furnish the name and address of the proposed transferee. Finally, the application must be supported by photographs and fingerprints of the transferee and by a certification of a particularly described local or federal law enforcement official (or other person acceptable to the Director) that he is satisfied that the fingerprints and photograph are those of the transferee and that the weapon is intended for

[5] The term "destructive device" does not include a device neither designed nor redesigned for use as a weapon, nor one which the Secretary of the Treasury or his delegate finds is not likely to be used as a weapon, or is an antique. 26 U.S.C. (Supp. V) 5845(f); compare 26 U.S.C. (Supp. V) 5845(a).

[6] No special government-furnished application form is required or available. The Director will accept as a valid application any written communication upon which the stamp has been affixed and in which the necessary information is contained.

lawful uses. 26 U.S.C. (Supp. V) 5812(a); 26 C.F.R. 179.98–179.99.[7]

Transfer of an unregistered weapon will not be approved. Even as to registered weapons, the Director reviews the information on the application before giving his approval and determines whether the transferee's possession of the weapon will violate any federal or local laws. 26 U.S.C. (Supp. V) 5812(a). If so, the original copy of the application will be returned with a statement of the reasons for rejection. If the application is approved, notice to that effect is put on the original copy of the application letter, which is returned to the applicant; the duplicate is placed in the central registry. Only after receipt of the approved application form is it lawful for the transferor to hand over the weapon to the transferee; at the same time, he is to give the approved application to the transferee. 26 C.F.R. 179.100. The information in the hands

[7] Evidently as a result of oversight, 26 C.F.R. 179.99 has not been changed since the adoption of Title II of the Gun Control Act of 1968. Under the prior laws the transferee was the applicant. See *Haynes* v. *United States*, 390 U.S. 85, 88–89; Brief for the United States in opposition to the Petition for a Writ of Certiorari in *Rayborn* v. *United States*, No. 5350, this Term, certiorari denied, October 12, 1970. Accordingly, the regulation still refers to the "applicant" as the one required to submit his own photographs, fingerprints, and law enforcement official's certificate. That, however, is clearly inconsistent with the present pertinent statute, Section 5812(a). We are informed that measures are being taken to update the regulation. In the meantime, all inquiries regarding the inconsistencies between the statute and regulation are being handled by the Alcohol, Tobacco and Firearms Division, which is furnishing prospective applicants with a description of the correct procedures for transferring firearms.

of the Director is not available to any one outside the Alcohol, Tobacco and Firearms Division, and cannot be used as evidence in a criminal proceeding with respect to a prior or concurrent violation of law, except in cases charging the submission of false information in the application. 26 U.S.C. (Supp. V) 5848; 26 C.F.R. 179.202.

The present statute thus differs from that before this Court in *Haynes* in a number of respects.

1. The class of individuals who are required to register weapons has been enlarged to include all possessors of weapons covered by the Act, with the exception of the federal government. See *United States* v. *Valentine*, 427 F. 2d 1344 (C.A. 8); 26 U.S.C. (Supp. V) 5861. Thus, it is no longer true that "only weapons used principally by persons engaged in unlawful activities would be subjected to taxation." *Haynes* v. *United States*, 390 U.S. 85, 87; H. Rep. No. 1956, 90th Cong., 2d Sess., p. 35.

2. The class of persons who are permitted to register or to accept transfers from registrants is limited to those whose control of the weapon appears to be lawful. This sharply contrasts with the registration requirements under the previous statutory system. There, any possessor of a covered firearm was compelled to disclose the fact of his possession by registration at any time he maintained possession. The Court in *Haynes* found that if a possessor attempted to comply with the registration provisions he would simultaneously reveal his own noncompliance with other provisions, as well as furnish potentially incriminat-

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ing information which the federal government made readily available to state, local and other federal officials. *Haynes, supra,* 390 U.S. at 95–100. Under the present scheme, as relevant here[8] only those possessors who lawfully make, manufacture or import firearms can lawfully register them. Individuals not within the class of lawful registrants described above simply cannot register a firearm. Prior to divestiture of possession by transfer to another, a lawful registrant must furnish information to the government as required by the transfer provisions of the law—in effect substituting the name of the transferee for his own as lawful possessor of the weapon. A would-be transferor who unlawfully possesses firearms can do nothing to legitimize a transfer.[9] In either case, the transferee does not and cannot register. Unless the gun has been registered to him by the transferor, full and literal compliance with the law for the transferee means nothing more than a refusal to take possession at all. *Minor* v. *United States,* 396 U.S. 87; *United States* v. *Black,* No. 20076, decided September 14, 1970 (C.A. 6); *United States* v. *Davis,* 313 F. Supp. 710 (D. Conn.); *United States* v. *Schofer,* 310 F.

[8] The statutory amnesty period, n. 4 *supra*, ended on December 1, 1968. The transfers alleged in the indictment occurred on or about October 2, 1969. App. 6–7.

[9] A theoretical problem may be presented under the statute, as worded, regarding the individual who finds a firearm and seeks to bring it to law officers for custody. Although it is clear such a person would never be prosecuted, the statute appears to make that conduct an offense. The possibility of the question arising is remote, however, and has no bearing on the sufficiency of this indictment.

Supp. 1292 (E.D. N.Y.); *United States* v. *Britton*, 306 F. Supp. 94 (S.D. Tex.).

3. The revised statute repeals 26 U.S.C. 6107, which provided for the sharing of firearms registration and transfer information with other law enforcement officials (Sec. 203(a), Pub. L. 90–618), and explicitly states that no information or evidence provided the government in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant in a criminal proceeding regarding prior or concurrent offenses (26 U.S.C. (Supp. V) 5848). In actual practice, we are informed, no information contained in an application to register or in the record of registration is disclosed to any law enforcement authorities, except as the fact of non-registration may be necessary to investigation or prosecution under this statute. Thus, Congress has done through legislation what this Court felt judges could not do as a matter of statutory construction in *Marchetti-Grosso-Haynes*, 390 U.S. at 58–59, 68–69, 99–100, placing restrictions on the use of information obtained through the registration procedures in order to permit the continued gathering of that information.

B. TRANSFEREES OF FIREARMS DO NOT FACE A REAL AND APPRECIABLE HAZARD OF SELF-INCRIMINATION

These changes insulate the statutory provisions from self-incrimination claims fully as effectively as the Harrison Narcotics Act provisions upheld last Term in *Minor, supra*, and thus achieve the congressional objective of establishing a scheme for firearms registration which does not infringe on the privilege. Like

the seller of narcotics in *Minor*, the transferee of a firearm is not confronted with a dilemma in which he apparently can comply with one part of the statute, but only at the risk of incriminating himself under another.[10] As there, he is flatly forbidden to proceed with the transfer until he has received a federal certificate of its legality—in *Minor*, an order form; here, an approved application for transfer. That certificate will not be issued unless the transfer is fully lawful. And if the transferee proceeds without a certificate it is that fact alone, and not any information supplied by the transferor in making an application or any failure by the transferee to perform subsequent incriminating acts, which the government must prove and which establishes his guilt.

As in *Minor*, it is unrealistic to believe that a lawful possessor of a registered firearm will often be involved in a prohibited transfer of such a weapon. By hypothesis, the weapon is in his custody with the

[10] The district court apparently found such a dilemma by interpreting California law to make any effort to obtain possession of a hand grenade an offense, so that the mere supplying of fingerprints to the federal government in connection with an application would be an offense. App. 28–33. Even assuming that that was a correct interpretation, see n. 12 *infra*, and that the fact of supplying fingerprints would be known to state authorities, see pp. 12–13, 20–21, no such dilemma realistically exists. It would then be known from the outset that an application for transfer would be futile, since it could be approved only if possession were lawful in California; there would be no lawful possessor in California who could be called upon to make an application for transfer. And even if an application were made, implicit in an application is the request that the transfer be approved only if lawful—giving the potential transferee a complete defense to any state prosecution for attempted possession or conspiracy to possess.

knowledge and approval of the authorities; he knows the requirements for transfer and presumably could find a lawful transferee should he wish to sell his firearms; he also knows that an unexplained disappearance of the weapon from his custody could bring criminal sanctions in its wake. In turn, persons wishing to obtain firearms for unlawful purposes will not wish to call attention to themselves by causing the filing of applications which stand no chance of success. Realistically, they will seek the firearms by unauthorized transfers in which the issue of complying with the Act's requirements will never arise, because the transferor could not possibly comply. Compare *Minor, supra,* 396 U.S. at 92–94, 96–97. In these circumstances, the claim that those requirements give rise to a Fifth Amendment objection on the part of potential transferees is simply irrelevant; any transaction with a transferor who can not lawfully transfer the firearm is strictly forbidden, and thus can never give rise to information which the government could use to incriminate.

Even in the unlikely case where an "unlawful" transferee approaches a willing, lawfully registered potential transferor, the Act requires no self-incrimination on the transferee's part. First, the burden of supplying information is placed on the transferor, not the transferee; ordinarily, a person may not claim the privilege with respect to information supplied the government by another. *Mower* v. *United States,* 402 F.2d 982, 985 (C.A. 8), certiorari denied, 394 U.S. 990; see *Minor, supra,* 396 U.S. at 91 n. 3. While it is true that transferees here, unlike petitioners in

*Minor,* must cooperate to the extent of supplying fingerprints and photographs which can be verified by a proper authority as genuine, such items would not usually be regarded as testimonial in nature. *Schmerber* v. *California,* 384 U.S. 757, 762; *Gilbert* v. *California,* 388 U.S. 263. And to the extent any information provided through the transferor might be deemed compelled vis-a-vis the transferee, the statute directly confers immunity from its use in any criminal prosecution for completed or contemporaneous offenses. In any event, it makes clear that the information is not to be shared with state or federal law enforcement officers in the manner previously authorized under 26 U.S.C. 6107, now repealed.

Immunity from use of the information supplied in connection with prosecution for violations of law "occurring prior to or concurrently with the filing of the application" gives ample protection to any claim of privilege in the context of this statute. As this Court noted in *Marchetti, supra,* 390 U.S. at 53–54, the applicability of the Fifth Amendment privilege to future conduct has rarely been in issue because prospective acts "will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." This is the precise situation in the registration of firearms. Applicants must obtain verification from a responsible official that the weapon is not intended to be used for unlawful ends. The only transferees who may lawfully receive a firearm are those who have not committed crimes in the past. The likelihood that individuals would incriminate themselves in the future by the mere act of applying is "a hypoth-

esis more imaginary than real." *Minor, supra,* 396 U.S. at 94. See also *Varitimos* v. *United States,* 404 F.2d 1030 (C.A. 1), certiorari denied, 395 U.S. 976. Section 5848 serves as an adequate use-restriction statute within an otherwise enforceable statutory scheme.[11]

In sum, the district court erred in its conclusion that the Act required appellees to furnish information which would have tended to incriminate them under California law, particularly California Penal Code §§ 12301 and 182.[12] Even assuming, as seems unrealistic, that their transferor could and would have filed an application to transfer the hand grenades to them, authority to do so could not have been granted unless it were first determined that the transfer was completely lawful, under both state and federal law. Al-

[11] Should the Court conclude, however, that the protection of registrants against prospective acts is a matter of actual rather than imaginary need within the framework of the firearms laws, Section 5848 may be interpreted to extend that far. In enacting Title II of the Gun Control Act of 1968, Congress expressly stated that it was intended to correct the infirmities of the existing statutory scheme relating to taxation of firearms. H. Rep. No. 1956, 90th Cong., 2d Sess., p. 35; S. Rep. No. 1501, 90th Cong., 2d Sess., 26, 42, 48, 51–52. That purpose is further manifested by the repeal of 26 U.S.C. 6107 (repealed by Section 203 of Pub. L. 90–618, Oct. 22, 1968) which provided for a list of "special" taxpayers and the furnishing of information therefrom to State and local prosecuting officers. See *United States* v. *Carlie,* No. Cr–70–101 (N.D. Cal.), decided May 21, 1970. Courts here are thus free of the inhibitions which this Court felt in *Marchetti-Grosso-Haynes, supra,* p. 15, and could properly construe the statute to provide the necessary protection.

[12] Section 182 is the State's general conspiracy statute. Section 12301 merely defines the term "destructive device" used in other

though the duplicate copy of any application would have been retained by the Director in a file for record-keeping purposes, the information contained therein would be withheld from disclosure to any parties outside the Alcohol, Tobacco and Firearms Division, including other government agencies. 26 U.S.C. (Supp. V) 5848. Since the repeal of 26 U.S.C. 6107, States have no access to the federal government files on weapons in private hands, or proposed transfers which have been rejected. The possibility of a State officer obtaining any information about a transferee of a weapon from the Director is, therefore, so remote as to render the potentiality of self-incrimination to the

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provisions of the code. The significant law is Section 12303 (1968 Cum. Supp.), which provides in pertinent part:

> Any person * * * who, within this state * * * possesses * * * any destructive device * * * except as provided by this chapter, is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the county jail for a term not to exceed one year, or in state prison for a term not to exceed three years, or by a fine not to exceed five thousand dollars ($5,000), or by both such fine and imprisonment.

§ 12302 provides for exemptions from the prohibition of the chapter to peace officers, military personnel, and fire fighting personnel. Furthermore, § 12305 provides for the issuance of permits to conduct a business using destructive devices "upon a satisfactory showing [of] good cause." § 12306 provides for permits for non-business purposes upon a similar showing. Presumably, the granting of a permit brings the holder within the exception language of § 12303. Thus, there appears to be no blanket prohibition in California against possession of destructive devices. Changes in the chapter dealing with destructive devices subsequent to the decision appealed from do not appear to alter this conclusion. See, *e.g.*, Chapter 771, Assembly Bill No. 1003 (Cal. Legis. Service 1970), which expands both the types of devices covered and the variety of prohibited

transferee "imaginary and unsubstantial."[13] *Marchetti, supra,* 390 U.S. at 48. But if a State official should be able to gain access in some unforeseen way, the information thereby obtained would be suppressible at a subsequent proceeding. See *United States* v. *Troska,* No. 4–69–Crim. 72, decided June 16, 1970 (D. Minn.). *United States* v. *Carlie,* No. Cr.–70–101, decided May 21, 1970 (N.D. Cal.). *Murphy* v. *Waterfront Commission,* 378 U.S. 52; *Marchetti* v. *United States,* 390 U.S. 39, 58–60. In light of these protections, a proposed transferee of a firearm faces no real hazard of self-incrimination from the proposed transferor's acts in seeking authority for a transfer as required by law.

## II

### THE STATUTE DOES NOT REQUIRE AN ALLEGATION THAT THE POSSESSION WAS ACCOMPLISHED WITH KNOWLEDGE AND INTENT THAT THE FIREARMS BE UNREGISTERED

#### A. THE STATUTE REQUIRES NO SPECIFIC INTENT

Section 5861(d) makes it unlawful for any person "to receive or possess a firearm which is not registered to

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uses: and Chapter 741, Assembly Bill No. 970 (Cal. Legis. Service 1970) which increases the punishment permissible under § 12303 to a possible 5 years in state prison. It would be possible to comply with the provisions of both California and federal law and legally possess destructive devices for lawful purposes. And see n. 10 *supra.*

[13] The custodian of the National Firearms Registration and Transfer Record advises us that since November 1, 1968, only two inquiries have been made as to whether a firearm was registered or whether a particular person has any firearms registered to him. In each instance, the inquirer was told, in accordance with Section 5848, that the records were privileged and that no information contained therein could be divulged

him in the National Firearms Registration and Transfer Record." Nothing contained in the language of the statute suggests the need for proof that the defendant must have known and intended that the firearms were and would be unregistered. The legislative history of the provision is silent on this point. But the statute is derived from an earlier provision, and the history of that enactment makes it plain that an indictment charging a violation of the present law need not allege specific knowledge and intent that the firearms be unregistered.

The forerunner of 26 U.S.C. (Supp. V) 5861(d) was 26 U.S.C. 5851, which made it unlawful to receive or possess a firearm transferred or made unlawfully, or to possess an unregistered firearm.[13] The specific prohibition against possession of "any firearm which has not been registered * * *" was added to section 5851 by Title II, § 203(h) of the Excise Tax Technical Changes Act of 1958, 72 Stat. 1275, 1428, and was said to be intended primarily to simplify and clarify the law "and to aid in prosecution." H. Rep. No. 481, 85th Cong., 1st Sess., 195–196. No consideration ap-

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or used in any criminal proceeding for violation of any law occurring prior to or concurrently with the registration. The custodian also indicates that, to the best of his knowledge, no information contained in any applications to register or record of registration has been disclosed to any authorities for use in any criminal proceedings whatsoever. Contrast *Grosso* v. *United States*, 390 U.S. 62, 66.

[13] *Haynes* v. *United States*, 390 U.S. 85, which held that a claim of privilege against self-incrimination provided a complete defense to prosecution, under Section 5851, of individuals required to register firearms under the prior law did not discuss the mental elements involved in such prosecutions.

pears to have been given to a possibility of including a requirement that the possessor must have knowledge of the firearm's unregistered status as a requirement for conviction under the amended section.

When this issue arose in the courts, it was uniformly resolved against such a specific scienter requirement. *United States* v. *Decker*, 292 F. 2d 89, 90 (C.A. 6), certiorari denied, 368 U.S. 834; see also *Sipes* v. *United States*, 321 F. 2d 174 (C.A. 8), certiorari denied, 375 U.S. 913; *Bryan* v. *United States*, 373 F. 2d 403 (C.A. 5). With little discussion, the courts stated simply that "[s]cienter is not involved." *Decker, supra*, at 90. The reference to the term "scienter" in those cases encompassed only knowledge of a firearm's unregistered status; *a fortiori* those cases rejected the proposition adopted by the district court here, that the government must prove specific intent that the weapons be unregistered as well as knowledge that they were in fact unregistered. But as noted in *Sipes, supra*, 321 F. 2d at 179,[15] regardless of what was meant by "scienter," the cases held that the only knowledge required to be proved under Section 5851 was knowledge that the instrument possessed by the defendant was a firearm. See also *United States* v. *Mares*, 208 F. Supp. 550 (D. Colo.), affirmed, 319 F. 2d 71 (C.A. 10); *United States* v. *Fogarty*, 344 F. 2d 475 (C.A. 6); *Taylor* v. *United States*, 333 F. 2d 721 (C.A. 10). Thus, when Section 5861(d) was considered and enacted, judicial construction had made plain that no proof of specific intent with respect to

[15] The ruling in *Sipes* was reaffirmed by the Eighth Circuit after this Court's decision in *Haynes*. *Mower* v. *United States*, 402 F. 2d 982, certiorari denied, 394 U.S. 990.

a firearm's registered status was needed to support a conviction for possession.

In this context, the silence of the legislative history of Section 5861(d) on the issue is eloquent. If the section were intended to add a new element of proof to the offense, the history would have spoken to that fact and, indeed, Congress would almost certainly have shown its purpose by adding appropriate language to the statute. The absence of additional words—the failure to add the word "knowingly" to the new statute—may fairly be characterized as evincing an intent not to change the prior law in this regard.

Instances where Congress requires "knowing" violations of the law are too numerous and well known to require extensive documentation. *E.g.*, 18 U.S.C. 2314; 50 U.S.C. App. 462. And, where appropriate, Congress has explicitly provided from time to time that ignorance of statutes or regulations is a defense to a charge of violating a law containing a requirement of specific knowledge. See, *e.g.*, 15 U.S.C. 79z–3; 15 U.S.C. 80a–48. Indeed, Congress has inserted specific "knowledge" requirements in other portions of this very Act, *e.g.*, 18 U.S.C. (Supp. V) 922 (See Appellees' Memorandum in Support of their Motion to Dismiss, 12). Another subsection of Section 5861 itself, 26 U.S.C. (Supp. V) 5861(l), explicitly requires specific knowledge, making it unlawful "to make, or cause the making of, a false entry on any application, return or record required by this chapter, *knowing such entry to be false*" (emphasis supplied).

In all the circumstances, a specific intent requirement should not be implied here. *Pena-Cabanillas* v.

*United States*, 394 F. 2d 785, 789 (C.A. 9); cf. *Morissette* v. *United States*, 342 U.S. 246. To be sure, there must be some evidence of mental state—that the accused knew that he possessed a firearm and that he intended to be in possession; in other words, that the possession was "willing and conscious." See *Baender* v. *Barnett*, 255 U.S. 224, 225. But to require more would seriously impede the original Congressional purpose to simplify and clarify the law and to aid in prosecution. H. Rep. No. 481, *supra*. What the ruling of the court below amounts to is a requirement that the government prove that a transferee was aware of the law's requirement that the transfer be approved. Since it is only in rare instances that ignorance of the law is a defense to criminal conduct, there is no reason to attribute to Congress the intent to impose such a requirement here.[18]

B. DUE PROCESS DOES NOT REQUIRE CONSTRUCTION OF THE STATUTE TO MAKE KNOWLEDGE AND INTENT REGARDING A FIREARM'S UNREGISTERED STATUS AN ELEMENT OF THE OFFENSE

This Court stated in *Lambert* v. *California*, 355 U.S. 225, 228, that a "vicious will" is no longer required to constitute a crime in all instances, "for conduct alone

[18] Former Section 5851 contained the following presumption which was made applicable in 1958 to prosecutions for possession of unregistered weapons:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

This language was not retained in Section 5861 of the present statutory system. There is no express indication of the reason for the deletion in the legislative history, although this Court's

without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." In *Morissette* v. *United States*, 342 U.S. 246, the Court described how the criminal law had progressed from an unyielding requirement that punishment be related to a culpable state of mind to recognition that it is fair, as to certain offenses, to make proof of the proscribed conduct alone sufficient for conviction.[17]

Discussion of statutory modifications of common law *mens rea* requirements is usually couched in terms of what most writers call "absolute" or "strict" criminal

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recent cases involving such presumptions surely played a part. *E.g.*, *United States* v. *Gainey*, 380 U.S. 63. We perceive no reason to infer from the deletion an intent on the part of Congress to increase the requisite knowledge that must be proven to convict for the possessory offense. In light of the government's burden to show proof of possession and lack of registration, the last sentence of Section 5851 was viewed as adding nothing to the government's case, for the defendant would have a right to explain his possession in any event. *United States* v. *Decker*, 292 F. 2d 89 (C.A. 6), certiorari denied, 368 U.S. 834; *Starks* v. *United States*, 316 F. 2d 45 (C.A. 9).

[17] Various terms have been used to describe criminal offenses having the common characteristic of modifying to varying degrees the common law element of *mens rea*—*e.g.* "malum prohibitum" (See Hall, *General Principles of Criminal Law* 337–342 (2d ed. 1960)); "public welfare offenses" (Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933)); "crimes of possession" (Bassiouni, *Criminal Law and its Processes* 72 (1969)); "civil offenses" (Perkins, *Criminal Law* 784–812 (2d ed. 1969)); or, "non-code statutory offenses" (Fox, *Statutory Criminal Law: The Neglected Part*, 52 J. Crim. L.C. & P.S. 392 (1961)).

liability as against the common law *mens rea* concept,[18] which was essentially a requirement that in addition to the active conduct or "actus reus" constituting a crime there must also be a mental element signifying moral blameworthiness. The concept of strict criminal liability is itself subject to differing interpretations, but in essence seems to describe crimes where the mental element is made irrelevant (except, perhaps, in terms of capacity to commit crime), so that a mistake of fact or complete ignorance will not excuse. See Perkins, *Criminal Law* 802–803 (2d ed. 1969); Mueller, *Mens Rea and the Law Without It*, 58 W. Va. L. Rev. 34, 38 (1955). Thus, in *United States* v. *Dotterweich*, 320 U.S. 277, 284, this Court approved of penalizing a corporate officer whose firm shipped adulterated and misbranded drugs in violation of the Food and Drug Act "though consciousness of wrongdoing be totally want-

[18] "* * * [T]his Court has never articulated a general constitutional doctrine of *mens rea*." *Powell* v. *Texas*, 392 U.S. 514, 535. "In general, two closely related but distinguishable notions are involved in the idea of *mens rea*. One is that conduct is criminal only if the actor is aware of the facts making it so. For example, it may be criminal under certain circumstances to possess narcotics. The question arises, does the actor know that the substance that he possesses is a narcotic? If he claims that he does not, will he be allowed to introduce evidence to that effect? If he may not, we have what is commonly described as an offense of strict liability, *i.e.*, one dispensing with *Mens Rea*. The other and rather more difficult notion includes what is sometimes referred to as awareness of wrongdoing. For example, does the possessor of narcotics know there is a legal norm that renders his possession criminal? It is hornbook law that the first of these two notions is usually a limitation on criminality, that the second is not." Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 108.

ing." In *Lambert*, on the other hand, the Court found that a municipality could not punish a person for failure to register his mere presence—"wholly passive" conduct which in itself neither connoted nor brought about any harmful effect. 355 U.S. at 228.

The statute here falls comfortably on middle ground. The conduct it regulates is the possession of hand grenades—highly dangerous offensive weapons. While an individual probably would not think that his mere presence in a city required any act of registration on his part, most individuals would not acquire hand grenades without questioning the legality of possessing them; nor would they be surprised to learn that there is a comprehensive federal statute strictly governing that possession. Failure to make this simple inquiry prior to possession, we submit, imparts a sufficient element of blameworthiness to satisfy even the common law *mens rea* requirement; punishment for possession in these circumstances is eminently justified, particularly when considered in terms of the destructive capabilities of the subject matter. An absolute requirement of government approval prior to knowing and intentional possession of such dangerous instrumentalities frustrates no basic principle of criminal law, nor does it shock traditional concepts of punishment for inexcusable ignorance of the law. See *Lambert, supra*, 355 U.S. at 228; Wasserstrom, *Strict Liability in the Criminal Law*, 12 Stanford L. Rev. 731, 735–736, n. 20 (1960).

Hand grenades are certainly no less dangerous than narcotic drugs nor less fitting subjects of federal regu-

lation. In *United States* v. *Balint*, 258 U.S. 250, 254, a conviction for sale of narcotics not in compliance with federal statutory regulations was affirmed, despite the defendants' claim that they did not know that the drugs were covered by the statute. This Court approved the

> * * * manifest purpose * * * to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. * * *

As in *Balint*, the situation here involves prosecution for active conduct on the part of the wrongdoers in that they took possession without first obtaining permission for that act. That duty is eminently reasonable, given the nature of the subject matter.

We do not contend that appellees would not be allowed to show as a defense at trial that they were unaware that they were in possession of hand grenades, or even that they were unaware of the presence of the box containing the grenades. The thrust of our contention is merely that proof of knowledge of the specific statutory prohibition against receipt or possession of the grenades, or of their unregistered status, is irrelevant to the offense charged. To require such proof under 26 U.S.C. (Supp. V) 5861(d) would have the anomalous result of insulating from conviction only those who fail to pursue the lawful procedures, unless the government could meet the difficult burden of proving knowledge of the registration requirements. The ab-

sence of such a requirement does not violate due process of law.

The conspiracy count of the indictment requires no greater "knowledge" requirement than that detailed for the substantive offense. As appellees point out, "[t]he nub of the problem is that a charge of conspiracy must include an unlawful agreement as to *each element* of the offense." (Reply Memorandum in Support of Motion to Dismiss at 13.) "Offense" in that context can mean no more than the substantive crime which the conspirators agree to commit. Therefore, as in the substantive offense, the key issue is whether knowledge of the unregistered status of the weapons which appellees conspired to possess is essential as an element of the offense charged by 26 U.S.C. (Supp. V) 6861(d). As noted above, that knowledge is not an element.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and the indictment ordered reinstated.

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DECEMBER 1970.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 345

UNITED STATES OF AMERICA,
Appellant,

vs.

DONALD FREED and
SHIRLEY JEAN SUTHERLAND,
Appellees.

Appeal from
District Court for the Central
District of California

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No. 345

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vs.

DONALD FREED AND SHIRLEY JEAN SUTHERLAND

On Appeal from the United States District Court for the Central District of California

# APPELLEES REPLY BRIEF

## Order Below

The district court rendered no opinion; its order granting appellee's motion to dismiss the indictment (App. 43-44) is not reported.

## Jurisdiction

The order of the district court was entered on March 10, 1970 (App. 43). The notice of appeal was filed on April 7, 1970 (App. 45), and this Court noted probable juris - diction on October 19, 1970 (App. 47).

## Questions Presented

1. Whether 26 U.S.C. 5861(d), 5841(b) and Related Statutes and Regulations compelled Appellees to incriminate themselves?

2. Whether Sections 26 U.S.C. 5861 (d) and 5841 (b) require that the transferee of an unregistered firearm know that it is unregistered when he takes possession?

3. Whether an Indictment under 26 U.S.C. 5861 (d) is defective for failure to allege that Appellees possessed a firearm?

4. Whether a conspiracy to commit an offense under 26 U.S.C. 5861 (d) requires an intent to violate the law?

5. Whether this Court has jurisdiction in a case where the trial judge has considered the merits of the case to some extent dismissing the Indictment and where his ruling is largely based on an interpretation of Government Treasury Regulations?

## Statutes Involved

26 U.S.C. (Supp. V) 5812 provides:

(a) Application.

A firearm [1] shall not be transferred

---

1/ 26 U.S.C. (Supp. V) 5845 defines "firearm" to include, in general, short-barreled guns other than pistols, machine guns, silencers, and destructive devices such as bombs, rockets and grenades.

unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph, business address, etc; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in

violation of the law.

(b) Transfer of possession.

The transferee of the firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

26 U.S.C. (Supp. V) 5841(b) provides:

By whom registered.

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

26 U.S.C. (Supp. V) 5841 (c) provides:

How registered.

Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this

section.

26 U.S.C. (Supp. V) 5861(d) provides:

> It shall be unlawful for any person *** (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record ***

26 U.S.C. Section 179.98

> Application to transfer.
>
> Except as otherwise provided in this subpart, no firearm may be transferred in the United States unless a written application, in duplicate, executed under the penalties of perjury to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The written application shall be filed by the transferor in letter form and shall identify the firearm to be transferred by the classification of the weapon (e.g. machine gun, short-barreled shotgun); serial number; manufacturer and importer, if any; caliber, gauge or size; in the case of a short-barreled shotgun or a short-barreled rifle, the length of the barrel; in the case of a weapon made from a rifle or shotgun, the overall length and the length of the barrel; and any other identifying marks on the firearm. The application shall identify the transferor by name and address; in the case of a special

(occupational) taxpayer under this part, the number of his occupational tax stamp; and if the transferor is other than a natural person, the title or status of the person executing the application. The letter application shall identify the transferee by name and address, and, if the transferee is a natural person not qualified as a manufacturer, importer or dealer under this part, he shall be further identified in the manner prescribed in Section 179.99 of this part and such information attached to the letter application. If the transferee is a qualified special taxpayer under this part, the serial number of his occupational tax stamp shall be shown. Any tax payable on the transfer must be represented by an adhesive stamp of proper denomination being affixed to the letter application, properly canceled. If the transfer is exempt from tax under this part, the application shall include a statement explaining the basis of the exemption.

26 U.S.C. Section 179.99

Identification of Applicant.

If the applicant is an individual, he shall attach to each copy of the application an individual photograph of himself, taken within one year prior to

the date of such application, and shall affix his fingerprints to such application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that the firearm is intended by the applicant for lawful purposes.

26 U.S.C. Section 179.100

Action on Application.

The Director will consider a completed and properly executed application to transfer a firearm. If the application is approved, the Director will return the original thereof showing approval to the transferor who may then transfer the firearm to the transferee along with the approved application. The approval of an application for transfer by the Director will effectuate registration of the firearm to the

transferee. The transferee shall not take possession of a firearm until the application for the transfer filed by transferor has been approved by the Director and registration of the firearm is effectuated to the transferee. The transferee shall retain the approved application as proof that the firearm described therein is registered to him. If the application to transfer a firearm is disapproved by the Director, the original application will be returned to the transferor with reasons for disapproval stated on the application. Applications to transfer a firearm shall be denied if the transfer, receipt, or possession of a firearm would place the transferee in violation of law.

## Summary of Argument

I. Congressional legislation aimed at curing the defects condemned in the Haynes case was again unsuccessful; for it still maintained the incriminatory network of Revenue Statutes and Treasury Regulations, which although partially introducing the transferor of destructive weapons as a conduit, nevertheless seriously incriminates the transferees of such weapons.

2. Both the Statutes and the Indictment fail to allege an indispensable scienter

requirement, to wit, that appellees took possession of firearms with knowledge that they had not been registered.

3. The Statutes and Indictment neglect to charge that the transferees of firearms had "knowing" possession although the Government concedes that scienter requirement to be an essential ingredient of the crime. The Indictment is not repairable and the Statute is unconstitutional.

4. Count One charges a conspiracy to violate the law governing the acquisition of unregistered weapons. Neither the Statute nor the Indictment alleges the necessary requirement that the Appellees conduct be designed to flout the law.

5. This Tribunal has no jurisdiction inasmuch as the Trial Court decided the case on the merits and his decision depended substantially on an interpretation of Treasury Regulations which conduct does not give rise to Appellate review.

I

APPELLEES TIMELY ASSERTED THEIR OBJECTION THAT COMPLIANCE WITH SECTIONS 5841 (c) AND 5861 (d), TITLE 26, UNITED STATES CODE, NEIGHBORING STATUTES, AND TREASURY REGULATIONS PROMULGATED UNDER THOSE STATUTES REQUIRED THAT THEY INCRIMINATE THEMSELVES CONTRARY TO THE GUARANTEES OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In substance, both counts of the Indictment allege that defendants violated 26 U.S.C. Section 5861 (d) by conspiring to possess, or possessing and aiding and abetting in the possession of destructive devices, to wit, a number of hand grenades, which had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841 (c), Title 26, United States Code. Section 5841 (c) provides:

" * * * * * * * *

(c) How Registered. - Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the regis-

> tration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder, to import, make or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section."
> * * * * * * * * * * * * * * * * * * * *

Section 5861 makes it unlawful for any person:

> "* * * * * * * * * *
>
> (d) To receive or possess a firearm which is not registered to him in the National Firearm Registration and Transfer Record [Section 5841(a)];
> * * * * * * * * * * * * * * * * * *"

Both of the above quoted sections of the Code are part of the Gun Control Act of 1968. The Act has as its announced purpose "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence..." The Gun Control Act of 1968 contains within it a number of provisions requiring registration of both firearms and persons in possession of firearms. Section 5841 (a) requires registration of each firearm, complete with identification and address of person entitled

to possession of the firearms. This information must be maintained in a central registry of all firearms, maintained by the Secretary of the Treasury. Subsection (b) requires the transferor of each registered firearm to identify to the Secretary the transferee. Thus, the transferee must reveal his name and address to the transferor whose obligation it is to directly communicate this information to the Secretary of the Treasury. In short, each possessor of a firearm is required by this section of the act to identify himself to the Secretary of the Treasury. Other sections of the Act similarly require a disclosure of those persons in possession of firearms. For example, Section 5812 contains an elaborate scheme for the identification of transferees through an application for a transfer of a firearm. Subsection (b) of Section 5812 prohibits a transferee from taking possession of a firearm unless the Secretary or his delegate have approved the transfer and registration of the firearm to the transferee as required by Subsection (a). Thus, the Act makes it abundantly plain that the possessor of a firearm must reveal this fact to the United States Government.

It is readily apparent that the revelation of possession of firearms [which by definition in the Act includes hand grenades] has a tendency to be incriminatory.

The Act itself is designed to aid in law enforcement and in fighting crime and violence. The legislative history of the Gun Control Act of 1968 emphasizes the need to combat the increasing crime rate, lawlessness and the growing use of firearms in violent crimes. 3 U.S. Cong. and Adm. News (1968), page 4412. The focus of the legislators in creating the new act was plainly upon crime and criminals. Furthermore, it is not difficult to demonstrate the possibilities for self-incrimination under the registration requirements of the law. California, for example, prohibits the possession of destructive devices such as those involved herein, and included in the registration requirement of the Federal Law. Thus, California Penal Code Section 12303 makes it a felony for any person to possess any destructive device (defined in Section 12301 (2) as "any bomb, grenade, missile or similar device or any launching device therefor") punishable by up to three years in State Prison and a fine of $5,000.00.

In Haynes v. United States, 390 U.S. 83 (1968)the United States Supreme Court declared the predecessor to the sections here involved unconstitutional in the light of the Fifth Amendment. Haynes involved a prosecution for possession of a firearm not registered under the Act. The Court first decided that a

prosecution for possession of an unregistered gun was subject to the same constitutional deficiency as was a prosecution for failure to register a firearm. The situation remains unchanged under the new law, which makes both possession and failure to register fundamental ingredients of the offense of possession of an unregistered firearm. The court next ascertained whether the registration requirements reasonably tended to incriminate the registrants. The court concluded that it did, pointing out that the registration requirements were such that they incriminated those who were immediately threatened by criminal prosecution under other sections of the act.

> "They are unmistakenly persons 'inherently suspect of criminal activities'." Haynes v. United States, 390 U.S. 92, 96 (1968).

The court also noted that certain prospective registrants might be threatened by prosecution under State Law. Such persons could also properly raise a claim of Constitutional privilege. (Id. at 390 U.S. 96, Note 11). The court emphasized that:

> "The correlation between obligations to register violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase

> the likelihood of his prosecution. Moreover, he can reasonably fear that the possession established by his registration will facilitate his prosecution under the making and transfer clauses of Section 5851. In these circumstances, it can scarcely be said that the risks of criminal prosecution confronted by prospective registrants are 'remote possibilities out of the ordinary course of law,' Heike v. United States, 227 U.S. 131, 144, 33 S. Ct. 226, 228, 57 L. Ed. 450; yet they are compelled on pain of criminal prosecution, to provide to the Secretary both a formal acknowledgment of their possession of firearms, and supplementary information likely to facilitate their arrest and eventual conviction. The hazards of incrimination created by the registration requirement can thus only be termed 'real and appreciable'. Reg. v. Boyes, 1 B. & S. 311, 330; Brown v. Walker, 161 U.S. 591, 599-600, 16 S. Ct. 644, 647-648, 40 L. Ed. 819." (390 U.S. at 96).

The Government contends that the newly amended gun control legislation eliminates the self-incriminatory aspects of the old gun registration requirements. See Haynes v.

United States, 390 U.S. 85 (1968). Basically, the Government contends that under the new act, the gravamen of the offense is "possession" by the transferee of unregistered destructive devices. Since under the new act there is no obligation on the transferee to obtain registration of the destructive device, the Government argues that the requirement that the transferor register possession to the transferee cannot make unregistered possession by the transferee a self-incriminatory act.

Haynes involved the former Section 5851 of the Act. That section made it an offense to possess a firearm which had not been registered as required by Section 5841. Section 5841 placed upon the transferee the obligation to register any firearm which was in his possession and which had not been registered to him. Initially, the court in Haynes rejected the argument that old Section 5851 merely punished "possession" of weapons which had never been registered by anyone. The court specifically found that old Section 5851 prohibited the possession of firearms which had not been registered by the transferee pursuant to the provisions of Section 5841. The court then rejected the argument that old Section 5851 punished "possession" while old Section 5841 punished a failure to register. The court held that a fundamental ingredient

of both offenses was a failure to register.

The court then launched into a two-pronged analysis of the self-incrimination aspect of the statute. The court noted that the obligation to register was conditioned simply upon possession of a firearm. However, not every possessor of a firearm was required to register. Only those who were in possession of firearms made, transferred or imported without compliance with other sections of the act were required to register firearms. Thus, the obligation to register firearms fell upon possessors who were most likely to reveal to the government that they were unlawfully in possession. That is, the obligation to register fell upon those who were threatened by prosecution under other sections of the act. The second aspect of the self-incrimination problem was that it was the transferee, the possessor, who was obligated to reveal the fact of his unlawful possession. Consequently, the Supreme Court found that the registration requirements made the hazards of self-incrimination real and appreciable.

The new sections, under which the defendants in this case are being prosecuted, made certain changes in the law which were designed to avoid the self-incrimination problem recognized in Haynes. The new law requires every destructive device and firearm to be registered in the National Registry

(26 U.S.C.A. Section 5841). This presumably has removed the objection that registration is required of virtually no firearms except those which are illegal, thereby making the threat of self-incrimination on this score "real and appreciable". Furthermore, the burden of registration under the new sections has been removed from the transferee and placed upon the transferor. This, it is argued, has eliminated the self-incrimination aspects from the registration requirement because the transferee is not required to reveal anything directly.

The contention that the new act eliminates the problem of self-incrimination because it does not require only those illegally in possession of weapons to reveal themselves is answered in Haynes. There the Supreme Court stated that if state laws made it illegal to possess certain kinds of weapons, the registration requirements under the federal law would be self-incriminatory. Under those circumstances, an individual required to register could raise the Fifth Amendment question. The California Statutes do prohibit the possession of destructive devices and defendants herein are entitled to raise the question in accordance with Haynes.

The argument that because the transferor must reveal information about the transferee, the transferee is not incriminating himself is not dealt with in Haynes. The

Government points out that the issue was raised but not decided by the Supreme Court in Minor v. United States and its companion case Buie v. United States, 90 S. Ct. 284 (1969). Both cases dealt with the availability of the Fifth Amendment as a defense to convictions for selling narcotics and marijuana without the written order form required by law. In each case the prosecution was against a seller, and the facts involved a sale made to an undercover agent who purchased without an order form. The law required the buyer to have the order form and reveal the seller's name in it. The court stated that it was unlikely that because the buyer was obligated to "inform" on the seller, the seller was thereby incriminating himself, but it did not decide the self-incrimination issue. 1/ However, Minor was decided in the context of a situation which involved illicit dealings on the part of both the buyer and the seller. The Supreme Court therefore concluded that even if the seller wanted to obtain an order form from the buyer, thereby indirectly incriminating himself, it was very unlikely that the buyer would comply with this request.

In the instant case the situation is quite different. The gun control law purports

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1/ Instead, the court decided that no buyer would be willing to obtain a purchase order, thereby freeing the seller to refuse to sell.

to make the transfer of weapons lawful under Federal Law. Presumably the transferor will gladly comply with the registration requirements of the act, if only the transferee will reveal his name, his address, supply fingerprints and all else that the regulations require, which can only be supplied by the purchaser, and which the seller must provide to the authorities. Thus, the buyer is placed in the dilemma presented by Leary v. United States, 395 U.S. 6, as well as Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62, and Haynes v. United States, 390 U.S. 85. The buyer is placed in a situation where he can purchase lawfully at his option, if only he will provide information whereby he incriminates himself under state law. The only difference between this and the Leary, Haynes, etc. situations is that the seller has become a "conduit". This is not what the court alluded to, but didn't decide in the Minor case.

The Government vigorously argues that the instant case is distinguishable from Haynes in that the new Section 5861 punishes only "possessio.", and not failure to register. As previously indicated, the Government relies on a series of what it claims are analogous statutes and cases which interpret them in support of its position. It is submitted that the situations are distinguishable and do not

support the Government's position. Although Congress intended to cure the maladies exposed by Haynes, it was unsuccessful.

Furthermore, the congressional attempt to grant immunity from prosecution to a registrant, in order to avoid the effect of the Fifth Amendment privilege, is ineffective. Section 5848, Title 26 U.S.C. provides that:

> "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence."

The purported immunity granted is too narrow to meet the requirements of the Fifth Amendment. It was obviously the purpose of Congress to prevent only prosecution for that possession involved in the particular act of registration. See 3 U.S. Code Congressional and Administrative News (1968), p.

4435. It is apparent that Congress was concerned only with the possible incrimination for past or present acts. This reads the Fifth Amendment privilege too narrowly. The Supreme Court in Marchetti v. United States, 390 U.S. 39 (1968) discussed this precise question. The Court said:

> "...Its linchpin is plainly the premise that the privilege is entirely inapplicable to prospective acts; for this the Court in Kahriger could vouch as authority only a generalization at 8 Wigmore, Evidence Section 2259c (3d ed. 1940). We see no warrant for so rigorous a constraing upon the constitutional privilege. History, to be sure, offers no ready illustrations of the privilege's application to prospective acts, but the occasions on which such claims might appropriately have been made must necessarily have been very infrequent. We are, in any event, bid to view the constitutional commands as 'organic living institutions' whose significance is 'vital not formal'. Gompers v. United States, 233 U.S. 604, 610, 34 S. Ct. 693, 695, 58 L. Ed. 1115.
>
> The central standard for the privilege's application has been

whether the claimant is confronted by substantial and 'real', and not merely trifling or imaginary, hazards of incrimination. (Case authorities omitted) This principle does not permit the rigid chronological distinction adopted in Kahriger and Lewis. For one thing, we see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence. Yet, if the factual situations in which the privilege may be claimed were inflexibly defined by a chronological formula, the policies which the constitutional privilege is intended to serve could easily be evaded. Moreover, although prosecutive acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true. As we shall show, it is not true here. We conclude that it is not mere time to which the law must look, but the substantiality of the risks of incrimination." (390 U.S. at 53, 54).

As the court noted in Marchetti, prospective registrants can reasonably expect

that registration will enhance their prospect for prosecution in the future and facilitate their conviction. One example alone should suffice. One who registers as the possessor of a destructive device may be supplying evidence necessary to show a conspiracy for the possession of destructive devices not only including the registered ones but other destructive devices. Furthermore, the fact of registration may readily be used to prove such elements of an offense as intent and knowledge. Thus, the claims of privilege under the Fifth Amendment relating to the charges here in question are quite broad, and the purported grant of immunity too narrow. In light of defendants' claim of a constitutional privilege, Sections 5841 (c) and 5861 (d) are as unconstitutional to him as were their predecessor sections involved in Haynes.

II

SECTIONS 5841 (c) AND 5861(d) TITLE 26 OF UNITED STATES CODE ARE UNCONSTITUTIONAL ON THEIR FACE AND AS CONSTRUED BY THE INDICTMENT HEREIN AND DEPRIVE DEFENDANTS HEREIN OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN THAT SAID SECTIONS SEEK TO PUNISH INNOCENT BEHAVIOR WITH GRAVE SANCTIONS.

Neither of the Code Sections here involved nor the Indictment herein include a requirement of unlawful conscious possession knowing that such a device or firearm has not been registered as required by Section 5841(c). Thus under the law and under the indictment here involved innocent possession of an unregistered firearm is made punishable. The punishment for Count Two alone carries a penalty of up to ten years imprisonment and a fine of $10,000.00. * It is submitted that only possession with knowledge of possession and knowledge of the character of the thing possessed may be lawfully punished. This requirement of "knowledge" is not a new one. In

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* Innocent as used here refers to conduct not violative of Federal law. The fact that the State of California punishes such conduct (California Pen. Code Section 12303) is irrelevant.

fact, it is the general rule for criminal statutes rather than the exception.

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil .... Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." ....
>
> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil .... Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be

> criminal is emphasized by the variety, disparity, and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent", "criminal intent", "malice aforethought", "guilty knowledge", "fraudulent intent", "wilfulness", "scienter", to denote guilty knowledge, or "mens rea", to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes." Morissette v. United States, 342 U.S. 246.

The scienter requirement is most necessary in situations where the accused is required to do nothing, and thus may have the least notice of guilt. It is, for example, an essential element of the crime of possession of stolen property. Similarily, the offense of being an accessory after the fact requires knowledge that a crime has been committed by someone else. This knowledge must be charged and proved, and failure to do

so requires a reversal. Government of Virgin Islands vs. Aquino, 378 F. 2d 540, 554 (3rd Cir. 1967).

The statute and indictment here involved can be constitutionally sound only if they require knowing possession of destructive devices, with knowledge that such devices had not been registered as required. This is peculiarly significant with respect to the registration requirement. Section 5841 (c) places upon the manufacturer, dealer, importer, or transferror the burden of registration. Yet it makes the apparently innocent possessor punishable for failure on the part of the transferor. Thus the mere passive act of possession is severely punishable under the law. The law condemns no act or omission, but denounces inadvertent status, and is unconstitutionally vague. Cf. Lanzetta vs. United States, 306 U.S. 451 (1939). The case of Lambert v. California is instructive here. The Lambert case was concerned with a Los Angeles Municipal Ordinance providing that all persons convicted of felonies who remained in Los Angeles for a period of more than five days register with the police. Failure to register was a misdemeanor. The Appellant in Lambert had been convicted of a felony in a court in Los Angeles. Thereafter she resided in the City of Los Angeles for a period of seven years without registering. Ultimately she was

prosecuted for failure to register. In holding the conviction unconstitutional and a violation of Appellant's right of due process of law the United States Supreme Court said:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865; Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021; Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178. These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." Lambert v. Cali-

fornia, 355 U.S. 225 (1957).

Although the Government seeks to limit the effect of Lambert to its own peculiar facts, it should not be so limited. For it could easily be claimed that a person who resides in a city should make himself knowledgeable as to the laws governing him. Of course, that type of endeavor as would have been the statutory exploration in this case is fanciful. In the present case, the objection to the failure to allege that the defendants' knew that the firearms were unregistered was not a mistake or ignorance of the law governing activities with firearms; rather, the Government's position, when exposed, is that although the firearms were admittedly unregistered by the Government Agent -- who had an affirmative obligation to do so -- and thus committed a crime -- the transferee is to be regarded as guilty. In other words, it is not ignorance of the law which concerns us here but simply ignorance of the fact that the firearms were unregistered as opposed to ignorance of the law stating that one cannot possess or receive an unregistered forearm. See Williams, Criminal Law p. 411 (1st Ed. 1953). The harsh application of such a statute is especially noxious in a case wherein the Government Agent is the transferor who deliberately flouts the law so as to by virtue

of his crime make those to whom he delivers the firearm equally guilty. The Government then immunizes the agent-transferor and uses him as a witness to prosecute the transferee whose crime is created by the Government Agent.

Initially, it is conceded by the Government that the legislative history underlying the statutes in question is totally silent with respect to whether they require that the transferee of an unregistered firearm have knowledge of its unregistered character. (Appellants Br. p. 22). The Government relies upon the predecessor statutes ruled vulnerable to the Fifth Amendment in the Haynes case, supra, and the decisions interpreting it as indicative of a deliberate policy of Congress to exclude any scienter requirement.

Of course, except in the narrow category of offenses called "public welfare offenses" (Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933); or "non-code-statutory offenses" (Fox, Statutory Criminal Law: The Neglected Part, 52 J. Crim. L.C. and P.S. 392 (1961) or Malum Prohibitum offenses, the crime must, in addition to the act, contain what has been termed mens rea or a "vicious will". Morissette, supra. Even in the absence of an express reference to mens rea it is presumably part of the crime. See Williams, supra, p. 238.

The cases cited by the Government furnish a good illustration of the domino theory of bad law. In United States v. Wost (N.D. Ohio) 148 F. Supp. 202 (1957), Judge Weick wrote an opinion, devoid of any authority, suggesting that the Federal Firearms Act as it pertained to sawed-off shotguns required no scienter. Then in the most frequently cited case of United States v. Decker (6th Cir. 1961) 292 F. 2d 89, 90, cert. den. 368 U.S. 834, Judge Weick, then a Circuit Court Judge, concluded similarly citing his own Wost opinion and no other authority. Analysis was noticeably missing from both decisions. Decker then spawned a number of decisions citing it and summarily dismissing the scienter argument. It is fair to say that no searching analysis of the scienter requirement under the statute in question or their predecessors was ever undertaken. Perhaps this is as good an occasion as any to examine the appropriate scienter under the new legislation.

It is clear that the Nineteenth and Twentieth Century development of Public Welfare offenses or nuisances requiring no scienter were intended to be merely regulatory or fiscal and involved but light penalties. Sayre, supra, pp. 56, 67, 68. Otherwise, the community outrage would be so vigorous as to nullify their enforcement. ibid 56. Sayre and others have earnestly urged the Courts to

restrict this growing breed of offenses or at least not allow lack of scienter when the penalties are great. Sayre, 70,73, 78-84, Hall, General Principles of Criminal Law, pp. 302-3 (1947); Williams, Criminal Law, 269 (1953). Moreover, the question of scienter is not to be resolved by determining whether the offense is one at common law or of exclusive statutory origin. Sayre, supra, 76. Sayre poses the question of how we determine which offenses warrant the inclusion of mens rea and which do not where the statute involved is entirely silent as to requisite knowledge. He suggests two cardinal principles. If the statute seeks to single out wrongdoers for punishment then mens rea is required. ibid. 72. It has been demonstrated that the past and present purpose of the legislation in question is to do just that. See Argument I, supra. The second criterion depends on the possible penalty. He suggests that imprisonment is too grave to allow deletion of mens rea. ibid. He catalogues the development of "public welfare" offenses, none of which are similar to the statutory scheme before the Court (ibid 73).

It is suggested that consistent with this Court's current thinking that a defendant may be entitled to a jury trial when his potential sentence is more than six months whether he be charged with a "crime" an "offense" or even "contempt" constitutes

a salutary demarcation between statutes wherein "knowledge", "intent" or an "evil will" is required and when it isn't. See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968); Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477 (1968); Cheff v. Schnackenberg, 384 U.S. 373, 86 S. Ct. 1523 (1966).

Furthermore, the legislation here involved is designed to control crime. Its purpose is neither to encourage crime, nor to cause its commission. Yet, Section 5861(d) interpreted to make it a crime to possess an unregistered destructive device may, it is submitted, cause crime, and may make it more difficult, rather than easier, to prosecute offenses under the section; the section, so interpreted, creates an entrapment as a matter of law in certain situations. A case in point is the instant prosecution. It is alleged that defendants conspired to, and did possess hand grenades not registered to them. The Government admits that its agent procured the devices, and that they were acquired from government sources. Therefore, it was a government agent who transferred the grenades, and it was the same agent who, as transferor, was obligated to perform the registration act. It was he, if anyone, who failed to comply with the law, and thus the crime, if any, originated with the Government Agent, and in

fact, its consumation was at all times in his control. He not only conceived the crime, but participated in its commission, and was the sole means of determining whether or not the crime would be committed. Unless defendants intended to possess unregistered devices, defendants were entrapped as a matter of law. But if the law as interpreted by the Government requires no knowledge with reference to registration, defendants could not know or have an intent to possess the unregistered devices, and only the Government Agent could have originated and compelled commission of the crime. Surely Congress did not intend such a result. And, if it did, Appellees were denied due process of law.

## III

THE INDICTMENT IS DEFECTIVE IN THAT IT DOES NOT EVEN ALLEGE THAT THE APPELLEES "KNOWINGLY" POSSESSED A FIREARM.

The indictment fails to allege that the defendants "knowingly" possessed a firearm. (Appendix p. 7). The Government, both in the Court below (ibid 20, 38) and here, has conceded that "

> "(t)o be sure, there must be some evidence of mental state - that the accused knew that he possessed a firearm and that he intended to be in possession; in other words that the possession was 'willing and conscious'." (citing Baender v. Barnett, supra, Appellants Br. pp. 25, 29).

Thus, the Government must admittedly incur a dismissal of the indictment unless its neglect to charge all of the elements of the offense is remediable at this stage. *

Appellees contend that since the indictment does not allege any scienter on their part this omission renders it fatally

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* At no place in the Government's Brief is this argument answered. The prosecution deals solely with the issue of whether scienter encompasses knowledge that the firearms were unregistered.

defective. Since knowledge is an essential element of the crime -- a fact conceded by the Government -- and knowledge is not pleaded, the indictment is void and confers no jurisdiction on the Court to proceed with a trial. Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038 (1962); Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270 (1960); United States v. Caryll, 105 U.S. 611, 612, 26 L. Ed. 1135; Government of Virgin Islands v. Aquino, (3d Cir. 1967) 378 F. 2d 540, 554.

The requirement that an indictment set forth each essential element of the offense arises out of the Constitution.

> "Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution. The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury .... This specific guaranty, as well as the Fifth Amendment's Due Process Clause, are, therefore, both brought to bear here. Of like relevance is the guaranty of the Sixth Amendment that "In all criminal prosecutions, the accused

shall enjoy the right *** to be informed of the nature and cause of the accusation; **** ....

In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprises the defendant of what he must be prepared to meet'"

and, secondly,

"'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction'". Russell v. United States (369 U.S. at 60-64, 82 S. Ct. at 1045-47).

Nor may a bill of particulars cure an invalid indictment.

"But it is a settled rule that a bill of particulars cannot save an invalid indictment ....

This underlying principle is reflected by the settled rule in the federal courts that an indictment may

> not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." (ibid. 369 U.S. at 769-70, 82 S. Ct. at 1050).

Consequently to suggest an amendment of the indictment or instructions adding elements to the offense cannot validate an invalid indictment.

In United States v. Carll, supra, followed with approval by this Court in Russell, supra, the Court held that:

> "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; ***"
> 105 U.S. at 612.

In Caryll, as here, the indictment failed to allege scienter though not expressly required by the statute "Hence a charge in the statutory language would not suffice." Russell, supra, 369 U.S. at 787, 82 S. Ct. at 1059 (dissenting opinion).

Thus, the logic of the Government's own position necessitates an affirmation by this Court that the indictment was properly dismissed.

IV 31

COUNT ONE OF THE INDICTMENT - THE CONSPIRACY CHARGE - REQUIRES THAT THE DEFENDANTS JOINTLY INTENDED TO VIOLATE THE LAW.

Although the Government blatantly asserts that the Conspiracy Count (Count One) of the indictment contains "no greater knowledge requirement than that detailed for the substantive offense" (Appellants Br. p. 30) such is clearly not the law. Moreover, the pleading is precisely to the contrary -- presumably in recognition of the distinction between the state of mind essential to proof of a conspiracy to commit a malum prohibitum or public welfare offense and a traditional substantive crime. (Appendix p. 5).

In this case Count One alleges a violation of 18 U.S.C. Section 371 maintaining that the Appellees "wilfully and knowingly combined, conspired, confederated and agreed, together" etc. "to commit an offense against the United States, that is, to possess destructive devices to wit: a number of hand grenades, which hand grenades had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841 (c), Title 26 United States Code, in violation of Section 5861 (d), Title 26, United States Code." In other words,

the indictment charges a wilful and knowing conspiracy to violate the law by possessing hand grenades which had not been registered. It was conceded that the Government Agent had not complied with the registration requirements, that the hand grenades were unregistered (Appendix 15-19).

Glanville Williams, the eminent criminal law text writer, tells us that

> "It is regularly held in the United States that conspiracy to do an act that is malum prohibitum not only needs mens rea but needs knowledge of the statutory prohibition, conspiracy being an exception to the rule that ignorance of the law is no excuse.." Williams, Criminal Law, pp. 263, 384 fn. 4 (1st Ed. 1953).

And indeed that is correct. It is axiomatic that in conspiracies to commit public welfare or malum prohibitum offenses there must exist in the mind of the perpetrator the specific intent that his conduct run afoul of the law or knowledge that his behavior is forbidden by law. C.I.T. Corporation v. United States (9th Cir. 1945), 150 F. 2d 85, 93; Pine v. United States, (5th Cir. 1943), 135 F. 2d 353, 357; Landon v. United States (6th Cir. 1924), 299 F. 75, 78; People v. Bowman, 156 Cal. App. 2d 784, 320 P. 2d 70 (1958); People v. Bernhardt, 222 Cal. App. 2d 567, 35 Cal. Rptr.

401 (1963); People v. Marsh, 58 Cal. 2d 732, 26 Cal. Rptr. 300 (1962). People v. Powell, 63 N.Y. 88 (1875); People v. Flack, 125 N.Y. 324, 26 N.E. 267 (1891), 11 L.R.A. 807; Commonwealth v. Gormley, 77 Pa. Super. 298 (1921); Commonwealth v. Benesch, 290 Mass. 125, 194 N.E. 905 (1935) (Hall and Glueck 428); Commonwealth v. Rudnick, 318 Mass. 45, 60 N.E. 353 (Hall, C.L. and P. 564); 38 H.L.R. 96; 62 H.L.R. 281; 89 U. of Pa. L. Rev. 640-2. Perhaps the Landon Court described it best when it asseverated:

> "When ... the prosecution is for conspiracy, the textbooks and the elementary discussions seem to agree that there must be a 'corrupt intent', which is interpreted to be the mens rea, the conscious and intentional purpose to break the law. Bishop's Crim. Law (8th Cir. Ed.); 297, 300."

Many of the decisions cited above deal with grave offenses and highly immoral conduct such as fraud and theft (e.g. Bowman, C.I.T. Corporation) or White Slavery (Pine). Thus it can in no way be contended that the conspiracy to possess unregistered weapons, as in this case, is legally distinguishable from those mentioned above and a plethora of others. Consequently, as to Count One of

the indictment, the specific intent to receive or possess unregistered handgrenades is an indispensable requisite to a valid indictment and subsequent conviction.

V

APPELLEES ASK THAT THE GOVERNMENT'S APPEAL BE DISMISSED IN THAT THE TRIAL JUDGE'S DECISION WAS HYBRID IN NATURE, BASED SUBSTANTIALLY ON FACTUAL CONSIDERATIONS AND VARIOUS TREASURY REGULATIONS AND CONSEQUENTLY NOT REVIEWABLE ON APPEAL.

This Court has often stated that the Government's right to appeal is entirely statutory in origin and is to be strictly construed.

Will v. United States (1967)
389 U.S. 90
88 S. Ct. 269

United States v. Mersky (1960)
361 U.S. 431
80 S.Ct. 459

Di Bella v.United States, Fla.-N.Y. 1962
369 U.S. 121
82 S. Ct. 654

Government appeals are unusual, exceptional, and not favored.

United States v. Borden Co. (1939)
308 U.S. 188, 192
60 S. Ct. 182

United States v. Apex Distributing Co. (9th Cir. 1959)
270 F. 2d 747

In the instant case the decision of the trial judge to terminate the proceedings was based

upon a number of coalescing considerations.

In the first place, more than the sterile indictment was before the Court. There was data obtained pursuant to a Bill of Particulars which revealed that the police agent in question purchased hand grenades from a Long Beach Naval Arsenal and violated the selfsame law he sought to convict the defendants of infringing by failing to register the grenades. Moreover, it was concluded that the crime was capable of commission only by this act of dereliction by the police agent since there is no federal crime to possess hand grenades, although there is a state statute covering the subject. (California Penal Code Section 12303). The Court's reasoning is replete with notions that the Government may not profit from its own wrongdoing, or participate in a violation of the same law sought to be leveled against Appellees. Although the formal result was a dismissal of the indictment that characterization is not controlling.

United States v. Thompson (1920)
251 U.S. 407
40 S. Ct. 289

What in effect was done here was to evaluate the conduct of the police agent vis a vis the defendants and dismiss the case. Accordingly a decision on the facts was reached and the case is not ripe for review. See United States v. Sissin, 90 S. Ct. 1117 (1970).

A second reason that the appeal is not authorized springs from the fact that the trial court's determination was not simply based on an interpretation of a statute but rather also included an interpretation of treasury regulations. (See e.g. Transcript of Proceedings of February 16, 1970 at pp. 9-10). For the proposition that a decision which construes regulations as opposed to a "statute" is not appealable we rely on the dissenting opinions in United States v. Mersky (1960), 361 U.S. 431, 80 S. Ct. 459.

## CONCLUSION

For the aforegoing reasons the decision of the Trial Court should be upheld and the case dismissed.

Respectfully submitted,

Luke McKissack

LUKE McKISSACK
Attorney for Appellees,
Freed and Sutherland

No. 345

Motion for leave to file petition for rehearing.
(not printed)